

Letter of Findings: 10-0497
Use Tax
For 2007, 2008, and 2009

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ISSUES

I. Use Tax – Maintenance Contracts.

Authority: IC § 6-8.1-5-1; [45 IAC 2.2-4-2](#); Sales Tax Information Bulletin 2 (December 2006), 20100804 Ind. Reg. 045100497NRA; Sales Tax Information Bulletin 2 (May 2002), 25 Ind. Reg. 3595.

Taxpayer argues that it was not subject to use tax on an elevator maintenance contract.

II. Use Tax – Computer Maintenance Contracts.

Authority: IC § 6-8.1-5-1; [45 IAC 2.2-4-2](#); Sales Tax Information Bulletin 2 (December 2006), 20100804 Ind. Reg. 045100497NRA.

Taxpayer maintains that it was not subject to use tax on a computer software and hardware maintenance agreement.

STATEMENT OF FACTS

Taxpayer is a corporation which operates a hotel in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer and determined that it owed use tax on several items. Taxpayer protested the imposition of use tax on an elevator maintenance contract and on a computer software and hardware maintenance agreement. An administrative hearing was conducted during which Taxpayer explained the basis for its protest. This Letter of Findings results.

I. Use Tax – Maintenance Contracts.

DISCUSSION

Taxpayer protests the imposition of Indiana use tax on an elevator maintenance contract. In particular, Taxpayer asserts that the contract is in fact a service contract and that "[Elevator Company] pays use tax on all tangible personal property used at the time of acquisition." The issue is whether the monthly payments paid on the elevator maintenance contracts are subject to Indiana use tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Under current Sales Tax Information Bulletin 2 (December 2006), 20100804 Ind. Reg. 045100497NRA, "[o]ptional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are subject to sales tax if there is a reasonable expectation that tangible personal property will be provided." Thus, under current Department interpretation, an optional warranty agreement is subject to sales and use tax if property is provided under the agreement unless the terms of the maintenance and warranty agreement otherwise comply with [45 IAC 2.2-4-2](#) (treating certain service contracts as nontaxable even if a minimal amount of tangible personal property is provided).

Prior to the issuance of the current Sales Tax Information Bulletin 2, the Department issued Sales Tax Information Bulletin 2 (May 2002), 25 Ind. Reg. 3595. The 2002 version of Sales Tax Information Bulletin 2 provided that "[o]ptional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are not subject to sales tax."

Taxpayer entered into the elevator maintenance contract in November 1994. The initial contract was for a five-year term with renewals every five years thereafter. Thus, the maintenance contract in question was entered into in 2004, prior to the issuance of the revised Sales Tax Information Bulletin 2. In this particular case, Taxpayer has established that use tax should not have been imposed on its payments under the renewed contract because the maintenance contract preceded the revised Sales Tax Information Bulletin 2. However, for future maintenance contract payments, Taxpayer would be subject to Indiana sales and use tax pursuant to Sales Tax Information Bulletin 2 unless Taxpayer can demonstrate that the contract otherwise falls under [45 IAC 2.2-4-2](#).

FINDING

Taxpayer's protest is sustained.

II. Use Tax – Computer Maintenance Contracts.

DISCUSSION

Taxpayer protests the imposition of use tax on computer hardware and software maintenance agreements. Taxpayer asserts that the contract is in fact a service contract for help desk support. The issue is whether the monthly service contract payments are subject to Indiana use tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Under Sales Tax Information Bulletin 2 (December 2006), 20100804 Ind. Reg. 045100497NRA, "[o]ptional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are subject to sales tax if there is a reasonable expectation that tangible personal property will be provided." For computer software maintenance agreements, the Sales Tax Information Bulletin 2 states:

In the case of software maintenance agreements or optional warranties, the presumption is that tangible personal property in the form of updates will be transferred. Software maintenance agreements and optional warranties are presumed to be subject to sales and use tax. This presumption can be rebutted if the taxpayer can demonstrate that no updates were actually received.

Taxpayer requested information regarding the maintenance contract. The company providing the warranty stated, "[w]e billed [Taxpayer] for help desk support and on site maintenance, which covers part and labor for covered repairs. Any non covered repairs would be billed separately and taxed accordingly." That company also provided software support to Taxpayer.

With regard to the software and hardware maintenance agreements, there is "a reasonable expectation that tangible personal property will be provided." Taxpayer has not provided sufficient information to demonstrate that general rule of taxability is not applicable.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

Taxpayer's protest is sustained on the elevator maintenance agreement and denied on the computer software and hardware maintenance agreements.

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